Filed 3/4/09 P. v. Reed CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANTOINE DEMETRIUS REED, Defendant and Appellant.	B206326 (Los Angeles County Super. Ct. No. YA067500)

APPEAL from a judgment of the Superior Court of Los Angeles County. James Brandlin, Judge. Conditionally reversed with directions.

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Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Antoine Reed appeals from the judgment following his conviction of one count of rape, one count of oral copulation with a person under age 16 and two counts of lewd conduct with a person age 14 or 15. Because the court erroneously refused to allow Reed to call a witness with potentially favorable testimony, we conditionally reverse the judgment and remand the cause to give defendant an opportunity to present the witness's testimony to the court for its determination of whether the testimony warrants a new trial.

FACTS AND PROCEEDINGS BELOW

The prosecution's evidence showed that Reed approached 15-year-old S. between 7:00 and 8:00 in the morning as she waited at a bus stop to go to school. Reed asked S. if she would like to be a model. S. said she did not know. Reed told S. that he was a "model[]ing agent" and asked her to walk over to his car to look at photographs and his camera. S. agreed. At the car, Reed showed S. a document that he said was his "modeling agent" license, his camera and an album of photographs of young women. Based on what Reed said and showed her, S. believed that Reed was a modeling agent.

Reed told S. that he would pay her $200 if she would go with him to model for some photographs. Although at first S. declined, telling Reed she had to go to school, she relented after Reed told her that "opportunities only come once." Believing that she was going to earn $200 for modeling, S. agreed to go with Reed. During the drive to the Botanic Garden in Palos Verdes, S. told Reed that she was 15 years old and Reed told her that he had daughters close to her age.

At the Botanic Garden, Reed paid the admission fee for one adult and one child, telling S. to "pretend like [she] was his daughter." Reed then led S. into the garden stopping along the way to take photographs of her. After they were deep into the garden, Reed asked S. to pose in her underwear but S. refused. When persuasion failed to achieve the desired result, Reed told S. that he had a knife in his camera bag. Frightened that Reed would use the knife, S. cried but did not resist when Reed removed her blouse, pulled down her bra and placed his hands and mouth on her breasts. After taking

photographs of S. with her breasts exposed, Reed stripped off her pants and underwear and took more photos. He then allowed S. to put on her clothes.

When S. continued crying Reed asked her if she would feel better and trust him if he destroyed the film. Although S. did not answer, Reed removed a film canister from his pocket and smashed it with a rock. (S. later saw Reed remove a film canister from the camera and place it in his pocket.)

Reed took S. deeper into the garden. Upon reaching a more secluded area Reed told S. to lie down. Still fearing the knife, she complied. Reed pulled her pants and underwear down, then his own. Next he forced S. to place a condom on his penis and engage in vaginal intercourse with him. He then forced her mouth open and inserted his penis. After that he pulled the condom off, grabbed S.'s hand and rubbed it on his penis, ejaculating on her face and neck. S. wiped herself off with her blouse, put on her clothes and they walked out of the garden.

Reed dropped S. off at her high school. As he drove away, S. wrote down the license number of Reed's car.

Two days after the assault, S. and her mother were passengers in a car driven by Detective Montenegro. While they were attempting to retrace the route Reed and S. took from the bus stop to the garden, S. suddenly became "hysterical" and began shouting: "[T]hat's him, that's him," pointing to a man walking from a store to his car. When the man saw S. pointing at him he made a quick U-turn, ran a red light and disappeared. During the drive the detective asked S. detailed questions about the incident.

Initially S. told police that Reed had "picked [her] up" and "thrown her into the car." Later she told police that Reed had threatened to "use a knife on [her]" if she did not get into his car. Still later, S. admitted to police that these versions were untrue and at trial she testified to a third version of events as described above. On cross-examination she admitted that she had initially lied to the police.

Samples taken shortly after the event matched body fluids found on S.'s breast and the semen on her neck and blouse to Reed.

Several months later when Reed was apprehended by police he denied knowing anyone named S., dropping a model off at school or having sex with a model. A week later he told police that he now remembered S. but denied having sex with her.

Testifying in his own defense, Reed admitted that both his statements to the police were untrue. He admitted having intercourse with S. in the garden but claimed that the encounter was consensual and that he believed S. was 19 years old.

According to Reed, S. approached him and expressed interest in being a model. She agreed to go to the Botanic Garden with him to pose for pictures in return for $20 and a copy of the prints to use in her modeling portfolio. S. told Reed that she was 19 years old and he believed her. At the Garden, Reed photographed S. as agreed. After the photo session ended, they argued over the amount Reed had agreed to pay S.; Reed claiming it was $20 and S claiming it was $200. In the course of their argument Reed remarked that S. would "have to do a little bit more than that for $200" and S. replied "let it do what it do." Taking that reply as a consent to engage in sex, and believing S. to be 19, Reed found a "nice spot," engaged in vaginal intercourse with her and ejaculated on her face and neck. Reed denied forcing S. to touch his penis and denied putting his penis in her mouth or putting his mouth on her breast.

Reed first realized that S. might have been lying about her age when she asked to be dropped off at a high school. Upon hearing this request he started "panick[ing]" and smashed the photo canister with a rock.

Reed told the court that he wanted to call S.'s mother as a defense witness to testify whether the police had "manipulate[ed]" S.'s testimony. Although he conceded that he did not know what the mother would say and was not able to make an offer of proof of her testimony because she had refused to talk to his investigator, he did explain: "She had a[n] inclination to not allow detective Montenegro to talk to her daughter because she felt like they were manipulating her daughter." The court, however, refused Reed's request to call the mother as a witness stating that Reed's "hope[] that she's going

to be able to provide [relevant] information" was not enough of a showing to allow her testimony.

A jury convicted Reed of one count of rape, one count of oral copulation with a person under age 16, two counts of lewd conduct with a person age 14 or 15 and found that Reed had suffered three prior "strike" convictions. The court denied Reed's motion to strike his prior convictions and sentenced Reed under the "three strikes" law to an aggregate term of 110 years to life, consisting of consecutive terms of 25 years to life on each count plus a consecutive term of 10 years for two prior convictions and imposed various fines. Reed filed a timely appeal.

DISCUSSION

I. PROSECUTORIAL MISCONDUCT

A. Background

Reed represented himself until shortly before the close of the prosecutor's case. In his opening statement he invited the jury "to jot down a few notes on your note pad because I will make you some promises that I must uphold." Reed told the jury, "[t]here was no sexual assault, no fondling, no lewd and lascivious acts." He also stated that he would present a DNA "expert to show you some other points on this DNA version of the District Attorney, and it's not going to . . . be this so many quantity trillion odds that it's me, either. And I want you to hold me to that."

After the parties had rested, in her initial closing argument, the prosecutor reminded the jury that Reed promised to deliver certain evidence and argued that he failed to do so. The prosecutor also reiterated the court's instruction that "counsel's statements are not evidence." She then commented that the jurors could not consider what Reed said in his opening statement as evidence "*other than* to show that the defendant, when he did get up and testify, is a person who doesn't even follow through on what he promises, a person that is not worthy of any credibility as to what he says[.]" (Italics added.) In addition, in her rebuttal argument the prosecutor urged the jury to "not ignore that opening statement. That's his statement. It doesn't have to be under oath."

Reed contends the prosecutor's argument to the jury constituted prejudicial misconduct because it invited the jury to treat Reed's opening statement as an *evidentiary* statement inconsistent with his trial testimony and thereby demonstrating his lack of credibility, that the error was not waived by lack of objection but that if the error was waived, counsel's inaction constituted ineffective assistance. We conclude that Reed waived the error by failing to object, the waiver did not constitute ineffective assistance of counsel and the error was harmless in any event.[1]

B. Waiver

It is a fundamental rule of appellate practice that "[t]o preserve a claim of prosecutorial misconduct during argument, a defendant must contemporaneously object and seek a jury admonition" (*People v. Bonilla* (2007) 41 Cal.4th 313, 336) unless an admonition would have been futile (*People v. Evans* (1952) 39 Cal.2d 242, 247-248.)

The attorney representing Reed at the closing arguments did not object to the prosecutor's comment or seek an admonition. Nevertheless, Reed argues, the error was not waived because the prosecutor's misconduct could not have been cured by an admonition from the court. Reed has not cited any case holding an objection and admonition would not cure an attempt to convert an opening statement into evidence where, as here, the court has instructed the jury that "[n]othing that the attorneys say is evidence [including] their opening statements and closing arguments[.]" Reed suggests that the jurors may not have understood that when he made his opening statement in pro. per. he was speaking as his "lawyer," not as a witness even though the court instructed the jury that: "When I refer to defense counsel, I mean the defendant." We do not find that distinction so subtle as to be "beyond the compass of ordinary minds." (*Shepard v. United States* (1933) 290 U.S. 96, 104.)

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1 The People maintain there was no misconduct because the prosecutor did not attack Reed's credibility as a witness but the genuineness of his defense in general. We interpret the prosecutor's argument as an attack on Reed's veracity as a witness.

C. Ineffective Assistance Of Counsel

Reed contends that his counsel was negligent in not objecting to the prosecution's argument. We conclude that Reed has failed to demonstrate professional negligence.

Generally, the failure to make a trial objection is a matter of judgment and tactics which appellate courts will not second-guess unless there could be no satisfactory explanation for the inaction. (*People v. Torres* (1995) 33 Cal.App.4th 37, 48.) Here, defense counsel could have reasoned that the best tactic was not to call additional attention to the "promises" Reed made to the jury during his pro. per. opening statement and his challenge to the jury to "hold me to [them]." Counsel reasonably could have concluded that the best approach was to call as little attention as possible to what Reed said in his opening statement and to emphasize that, whatever he said, he said "as his own lawyer, so you're going to have to disregard that."

D. Harmless Error

In any case, the prosecutor's remark does not require reversal of the judgment.

Our Supreme Court has observed that the "'crucial assumption'" underlying our system of trial by jury is that jurors understand and follow the trial court's instructions. (*People v. Smith* (2007) 40 Cal.4th 483, 517.) Here the trial court instructed the jurors that reference to the defense was a reference to the defendant and it was obvious to the jurors that Reed was acting as his own attorney when he made his opening statement. The court instructed the jury that "[n]othing that the attorneys say is evidence" and that "[i]n their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." We assume that the jury understood and followed the court's instructions. Accordingly, it is not reasonably probable that Reed would have obtained a more favorable result had the prosecutor not made the comments about his opening statement. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. EVIDENCE OF REED'S PRIOR FELONY CONVICTIONS

A. Background

Over Reed's objection, the court ruled that if he testified he could be impeached with his 1985 convictions for robbery and assault with a firearm and his 1991 conviction for robbery. Reed nevertheless chose to testify and his counsel began his examination by asking Reed to admit those three convictions. On appeal, Reed maintains the court erred in ruling that the convictions could be used for impeachment. We disagree.

B. Use Of The Robbery And Assault Convictions For Impeachment

Initially the People argue that Reed waived any error in the court's ruling on the use of the convictions for impeachment because he failed to make a timely objection and he invited the error by introducing the convictions in his direct testimony. We reject these arguments. Reed objected to the disclosure of any of his prior convictions when he was representing himself. It was not necessary for the attorney who took over his representation to repeat the objection. Neither did counsel invite error by introducing the convictions on his direct examination of Reed. When an effort to exclude prior convictions fails, prudent defense counsel typically ask a defendant to admit the convictions in order to minimize their sting. (See *Williamson v. Pacific Greyhound Lines* (1949) 93 Cal.App.2d 484, 487.)[2]

Reed maintains the court erred in ruling that the robbery and assault convictions could be used for impeachment because they bore only a "tenuous" relationship to Reed's honesty (*People v. Castro* (1985) 38 Cal.3d 301, 315), they were too remote in time to be probative of the truthfulness of his testimony (*People v. Collins* (1986) 42 Cal.3d 378, 392), and they were too similar to the current rape charge because they involved an element of violence (*People v. Ballard* (1993) 13 Cal.App.4th 687, 697-698.) The use of

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2 The case cited by respondent, *People v. Gutierrez* (2002) 28 Cal.4th 1083, is not on point. In *Gutierrez*, defense counsel, for tactical reasons, "expressly requested the trial court to reverse its prior ruling and rule admissible for impeachment purposes the 1984 prior conviction." (*Id*. at p. 1139.)

prior convictions for impeachment, however, is a matter within the sound discretion of the trial court and the court's decision will not be disturbed on appeal absent a manifest abuse of that discretion. (*People v Sandoval* (1992) 4 Cal.4th 155, 177-178.) Because both robbery and assault with a deadly weapon are crimes of moral turpitude, evidence that a witness has been convicted of those crimes is admissible to impeach the witness's testimony. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1139 [robbery], *People v. Cavazos* (1985) 172 Cal.App.3d 589, 593 [assault with deadly weapon].) The jury is permitted to draw an inference that a person who committed robbery and assault with a deadly weapon "is more likely to be dishonest than a witness about whom no such thing is known." (*People v. Castro*, *supra*, 38 Cal.3d at p. 315, fn. omitted.)

No bright time line separates convictions that are too remote to be probative of honesty from convictions that are not. (Cf. *People v. Newton* (1980) 107 Cal.App.3d 568, 574 [10 year old conviction "close" to being too remote] with *People v. Massey* (1987) 192 Cal.App.3d 819, 823 [19 year old conviction admissible].) In addition to the passage of time, the court may consider the age of the witness when convicted and whether the witness thereafter led a blameless life. (*People v. Burns* (1987) 189 Cal.App.3d 734, 738.) Reed suffered his convictions as an adult. Moreover, he did not lead a blameless life following his convictions in 1985 and 1991. In 1990 Reed was convicted of possession of cocaine for sale and in 1998 he was convicted of a misdemeanor trespass.

The critical question for the court in assessing the admissibility of a defendant's prior conviction is whether the probative value of that conviction on the issue of honesty outweighs the danger the jury will conclude that because the defendant committed the prior crime he committed the current one. This is a particular concern where the prior and current crimes are the same or similar. (See e.g. *People v. Ballard*, *supra*, 13 Cal.App.4th at pp. 697-698.) That concern is not present in this case, however. Although robbery, assault and rape all involve the use of force (or fear of force) it is not reasonably probable that a rational juror would conclude a person who engaged in

robbery or assault necessarily possesses the disposition to commit rape. Robbery involves the theft of one's property; rape involves the theft of "something . . . too personal even to be personal property." (Radin, Market-Inalienability (1987) 100 Harv. L. Rev. 1849, 1880.) Thus, considering the nature of the prior convictions, Reed's criminal history, and the nature of the current charges, the court did not abuse its discretion in ruling that the convictions could be used to impeach him if he testified.

III. MOTIONS TO APPOINT AND DISCHARGE COUNSEL

A. Background

Reed was originally represented by a deputy public defender. After the court denied Reed's motion under *People v. Marsden* (1970) 2 Cal.3d 118 to appoint new counsel, Reed made a motion under *Faretta v. California* (1975) 422 U.S. 806 to represent himself which the court granted. A few weeks before the start of trial Reed made a request for appointment of stand-by counsel which the court granted. Just before the start of trial, the court denied Reed's request to have his stand-by counsel appointed as cocounsel. Before the close of the prosecution's case, Reed moved to abandon his self-representation and to have his stand-by counsel appointed as his counsel of record. The court granted these requests. The next day, Reed made a motion to revert to self-representation which the court denied. Immediately after sentencing, Reed made a *Marsden* motion to appoint new counsel which the court denied without a hearing. Reed contends the court erred in denying his motion for appointment of cocounsel, his motion to revert to self-representation and his post-sentencing motion for appointment of new counsel. We find no errors in denying these motions.

B. Refusal To Appoint Cocounsel

After Reed had handled numerous pretrial matters in propria persona, the court appointed Richard Kim as standby counsel. A few weeks later, just as the prospective jurors were entering the courtroom for voir dire, the following colloquy took place between Reed and the court.

"The defendant: Your Honor may I ask a question, please?

"The court: The jurors are on their way in. What's the question, quickly?

"The defendant: Is it possible that I could actually use Mr. Kim as co-counsel, because it's problematic when you're dealing with . . .

"The court: No. The request for co-counsel status for attorney Richard Kim, who is present as stand-by counsel, is denied.

"The defendant: Okay.

"The court: So there is no co-counsel, and there is no advisory counsel; he's stand-by only."

Reed acknowledges that the appointment of cocounsel for a self-represented defendant is a matter within the trial court's discretion. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1004.) He argues, however, that he is entitled to a per se reversal of the judgment in this case because the trial court failed to exercise its discretion. He asserts, in its impatience to avoid a delay in the commencement of the trial, the court cut him off in mid-sentence as he was offering his reasons for requesting appointment of cocounsel. We disagree. The trial court did not err in denying Reed's request for cocounsel, but even if it did Reed is not entitled to reversal because we cannot say that denial of cocounsel would have been an abuse of discretion

Our Supreme Court held in *In re Cortez* (1971) 6 Cal.3d 78, 85-86: "'To exercise the power of judicial discretion all material facts in evidence must be both known and considered, together with the legal principles essential to an informed, intelligent and just decision'"].) It does not follow, however, that a defendant is entitled to request the court to exercise its discretion at any time in any matter even if it disrupts the proceedings. At the time Reed requested appointment of a cocounsel, he had been representing himself for four months and had presented motions to suppress evidence and for discovery. Thus, he was familiar with the issues and evidence in his case. It does not appear that Reed had any valid reason for waiting to request cocounsel until voir dire was about to commence. Under these circumstances we cannot say that the court abused its discretion in giving

Reed's request short shrift. In any event, nothing precluded Reed from renewing his request at an appropriate time.

Even if we assume that the court failed to exercise its discretion, this error would not entitle Reed to a reversal of the judgment, because we cannot say that as a matter of law the court would have abused its discretion if, after a more thorough consideration, it denied his request. (Cf. *People v. Bigelow* (1984) 37 Cal.3d 731, 744 [failure to exercise discretion concerning appointment of advisory counsel is reversible per se only if record shows that refusal to so appoint would have been an abuse of discretion].) In an analogous case, *People v. Crandell* (1988) 46 Cal.3d 833, the defendant made several requests for appointment of cocounsel. These requests were summarily denied and there was "no evidence that any judge engaged in a reasoned exercise of judgment based on an examination of the particular circumstances of this case." (*Id*. at p. 862.) Nevertheless, the court held that the trial court's failure to exercise discretion was not reversible error because "in this case it would *not* have been an abuse of discretion to deny the request for appointment of advisory counsel." (*Ibid*.) The court distinguished *Bigelow* because "Bigelow, representing himself, proved totally incompetent as a defense attorney[.]" (*People v. Bigelow, supra*, 37 Cal.3d at p. 745.) In contrast, the court described defendant Crandell as "an obviously intelligent, literate, and articulate advocate in his own [defense]." (*People v. Crandell, supra*, 46 Cal.3d at p. 864.) The court noted that Crandell had brought discovery and other motions, subpoenaed witnesses, engaged in skillful examination and cross-examination, and demonstrated the ability to research the law, cite applicable precedent and engage in reasoned argument. (*Ibid*.)

Like Crandell, Reed demonstrated that he was adequately versed in criminal procedure and trial practice. He made motions to appoint a DNA expert and to bifurcate the trial on the prior convictions which were granted, a motion for discovery which was granted in part, and motions to dismiss the case, suppress evidence and quash the venire. Reed also showed the ability to conceive a defense strategy and use examination and cross-examination to further that strategy. (Stand-by counsel described Reed as

"appear[ing] to be very articulate and intelligent.") Accordingly, it would not have been an abuse of discretion to deny the request for cocounsel and Reed is not entitled to reversal.[3]

C. Refusal To Allow Reed To Revert To Self-Representation

Reed represented himself throughout most of the pretrial proceedings and the trial of the People's case. Just before the prosecution called Detective Montenegro, its last witness, Reed asked to give up his self-representation and requested that his stand-by counsel be appointed to represent him. The court told Reed that it was willing to grant his request with the understanding "that once I make the determination on that request, that's it. I'm not going to -- I'm not even going to listen to a request for you to represent yourself again during the course of this trial. . . . Do you understand?" Reed responded, "Yes, your Honor." The court next asked Reed: "Do you now waive and give up your right to pro per privileges and request counsel be appointed to represent you?" Reed responded, "Yes, I do." The court then granted Reed's request, terminated his pro. per. privileges and appointed his stand-by attorney as attorney of record.

Reed's counsel represented him through the remainder of the prosecution's case and examined Reed's DNA expert witness. The following day, Reed informed the court that he wanted to revert to self-representation because he was dissatisfied with his counsel's representation. The court asked Reed if he was making a *Marsden* motion and Reed stated that he was. In a closed hearing Reed explained his dissatisfaction with counsel's cross-examination of Detective Montenegro and examination of his DNA expert and counsel explained the reasons and tactics for his actions. After hearing Reed and his counsel, the court denied Reed's *Marsden* motion finding counsel's performance

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3 Reed's appellate counsel suggests that Reed may have used the term cocounsel when what he actually sought was advisory counsel which requires a lesser showing of need on the defendant's part. We decline to speculate about whether Reed meant something other than what he said, especially in light of Reed's demonstrated sophistication in criminal procedure.

did not fall below the standard of a reasonably competent lawyer. The court added that it was denying Reed's request to represent himself as "untimely" and "dilatory."

Reed does not challenge the court's ruling on his *Marsden* motion. He does contend, however, that the trial court abused its discretion in denying his request to represent himself, asserting that untimeliness is not a valid ground for denying such motion and that the evidence does not support a conclusion that he was dilatory. We disagree.

A defendant's requests to proceed *pro se* prior to the commencement of trial must be granted if the court determines that the defendant has voluntarily and intelligently elected to do so. Whether to grant a defendant's mid-trial request for self-representation, however, lies within the trial court's sound discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 124.) The considerations in exercising discretion include "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Id*. at p. 128.)

First, we hold that in accordance with *Windham*, the court properly considered timeliness as a ground for denying the motion. Further, considering all the circumstances, the record supports the court's discretion in denying the motion.

The record establishes Reed's proclivities to flip-flop on the issue of self-representation and substitution of counsel, his lack of a valid reason to discharge his counsel and resume pro. per. status, and supports the court's findings that Reed was engaged in dilatory tactics. Reed asserts that because he did not request a continuance, no disruption or delay would have resulted from granting his request for pro. per. status. Even assuming this contention is factually correct, our Supreme Court has held that all of the *Windham* factors need not be present to support the denial of a request for self-representation. (*People v. Hamilton* (1985) 41 Cal.3d 408, 421.) In particular, "[t]he fact that defendant did not ask for a continuance is not determinative. [Citation.]" (*Ibid*.)

D. Denial of Post-Sentencing *Marsden* Motion

After the court pronounced sentence it advised Reed of his appeal rights and then addressed his counsel, asking: "Mr. Kim, will you be filing a notice of appeal on [Reed's] behalf?" Counsel responded: "Your Honor, I will. But -- *I've just been told by Mr. Reed* that he wants to request a *Marsden* hearing." The court responded: "It's a little untimely at this point. The request for a *Marsden* hearing is denied." (Italics added.)

Reed maintains that the court committed reversible error by denying his *Marsden* motion. We disagree.

Under *Marsden*, "the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695; italics added.) No purpose is served in substituting appointed counsel after the pronouncement of sentence because, except for filing a notice of appeal on the defendant's behalf, there is nothing left for trial counsel to do. Here, Reed's current trial counsel advised the court that he would file a notice of appeal on Reed's behalf.

On appeal Reed suggests that substituted counsel could have moved for a new trial. Not so. A motion for new trial must be "made and determined before judgment." (§ 1182.) Our Supreme Court has interpreted this requirement as meaning that the motion must be made and determined before sentencing. (*People v. Braxton* (2004) 34 Cal.4th 798, 810.)

IV. EXCLUSION OF S.'S MOTHER'S TESTIMONY

A. Background

At a time when Reed was still representing himself, the court asked him to identify the witnesses he intended to call.

When Reed named S.'s mother the court assumed Reed wanted to question her about whether S. had claimed to be the victim of sexual molestation in the past. The

court stated it was not inclined to permit that question but before making a final ruling on that issue it would review the cases under Evidence Code section 782.[4]

Reed then asked the court whether he could question S.'s mother "concerning everything other than [S.'s prior sexual conduct] until final ruling is made on the 782?" This question led to the following colloquy between the court and Reed.

"The court: What would she be able to testify to that she would have direct knowledge of?

"The defendant: She had a[n] inclination to not allow Detective Montenegro to talk to her daughter because she felt like they were manipulating her daughter. So I'm wondering what brought her to that point where she felt like they were manipulating her daughter.

"The court: Under [section] 352, I don't find that particularly probative, and that's the conclusion of this person, maybe. But I don't think that it's relevant as it relates to the facts before the jury. Her feelings about law enforcement or their investigation aren't relevant.

"The defendant: What if she actually knew what they actually said or did to her daughter?

"The court: What's your offer of proof?

"The defendant: That was just it. I don't know the whole reason as to why she didn't want Montenegro to talk to her daughter alone.

"The court: This isn't the time for depositions. I'm not going to allow you to call the witness on the hopes that she's going to be able to provide information to make it relevant. What else do you have? Who else do you want?

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4 The court stated: "As it relates to [mother], I'll withhold ruling depending on whether you testify and whether or not you establish the alleged statement relative to prior molestation." The People correctly note that the court never did issue a final ruling on the admissibility of evidence of S.'s past sexual conduct under section 782. But the admissibility of that evidence is *not* the subject of Reed's appeal. Rather, as we explain below, the issue on appeal is whether the court erred in refusing to allow Reed to call S.'s mother as a witness to police attempts to "manipulate" S.'s testimony.

"The defendant: Based on your rulings concerning [section] 352, that may be all that I want to offer right now."

Reed maintains that the court erred in excluding S.'s mother's testimony about Detective Montenegro "manipulating" S. and that the error was prejudicial as to all four counts against him. The People contend the court properly excluded mother's testimony because (1) her "feelings" about law enforcement or police investigations were not relevant to any issue in the case; (2) even if mother's attitudes were tangentially relevant, her testimony was properly excluded under Evidence Code section 352 because her testimony would have consumed an undue amount of time on a collateral issue; and (3) Reed cannot challenge the exclusion of mother's testimony because he failed to make an adequate offer of proof of her testimony.[5]

We conclude that the court abused its discretion in prohibiting Reed from examining S.'s mother and that the remedy for this error is to conditionally reverse the judgment as to all counts and remand the cause to permit defendant an opportunity to present mother's testimony for the trial court's determination whether it is reasonably probable that admission of her testimony would have resulted in a more favorable outcome for Reed.

B. Disallowing S.'s Mother As A Witness

When Reed initially attempted to explain the testimony he expected S.'s mother to give, he referred to mother's "inclinations" and "feelings" that Montenegro was "manipulating" her daughter. The court ruled that mother's "feelings about law enforcement" and its investigative techniques were not relevant to the issues in the case and even if they were the court was excluding her testimony under Evidence Code section 352. Reed then clarified that his intent in calling S.'s mother as a witness was not

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5 Evidence Code section 354 states in relevant part that a judgment shall not be reversed based on the erroneous exclusion of evidence unless the error resulted in a miscarriage of justice and "(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means[.]"

to ask her about her "feelings" regarding law enforcement but to ask her what the law enforcement officers in this case "actually said or did" to persuade S. change her testimony.

Evidence that Montenegro or any other law enforcement officer persuaded S. to change her version of events would be relevant to both S's credibility and the credibility of the officer. Indeed, the court apparently recognized that mother's testimony was potentially relevant because it asked Reed for an offer of proof as to what mother would say if she was called as a witness. However, when Reed responded "I don't know the whole reason as to why she didn't want Montenegro to talk to her daughter alone," the court stated it would not allow Reed "to call the witness on the hopes that she's going to be able to provide information to make it relevant."

A trial court has broad discretion in excluding evidence under Evidence Code section 352.[6] Nevertheless, in exercising discretion whether to admit or exclude evidence proffered by a criminal defendant this Division has cautioned that "discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.'" (*People v. De Larco* (1983) 142 Cal.App.3d 294, 306, citations omitted.)

Here, the court abused its discretion in excluding S.'s mother's testimony.

A criminal defendant making an offer of proof is only required to "fully and clearly state 'the fact which counsel *desires* to prove and the manner and evidence by which he *proposes* to prove it.'" (*People v. Jones* (1960) 177 Cal.App.2d 420, 425, citation omitted, italics added.) Reed made it sufficiently clear that he was not merely seeking evidence of S.'s mother's "feelings" about the police interrogations of her daughter but what the police "actually said or did to her daughter" in terms of directing

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6 Section 352 authorizes a court to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will consume an undue amount of time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury.

her testimony and that he proposed to prove what the police said and did through the testimony of S.'s mother, a percipient witness to at least one law enforcement interview of S.

The court's requirement that Reed demonstrate a greater degree of certainty as to *how* mother would testify imposed an insurmountable burden on the defense. Nothing in the record suggests that Reed had any avenue of finding out what mother knew about the police conduct other than by calling mother as a witness. He did not have the right to conduct a pretrial interview or deposition (*Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1332) and, as the prosecutor told the court, mother had refused to speak to Reed's investigator and refused to be questioned by Reed except on the witness stand. As the Supreme Court recognized in *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 873, when the defendant has not had the opportunity for a pretrial interview with the witness to determine "precisely what favorable evidence" the witness possesses "the defendant cannot be expected to render a detailed description of [the] lost testimony." In those cases, the court held, to establish error in excluding the evidence the defendant need only "make some showing of materiality." (*Ibid.*) The defendant may make such a showing on the basis of undisputed facts already in the record or on those facts plus additional facts. (*Ibid.*)

The record supports the possibility that mother could give material testimony about police manipulation of S.'s testimony. At the time the issue of mother's testimony arose, Montenegro had already testified that S.'s mother was present during at least one of Montenegro's interrogations of S. Testimony also showed that S. had changed at least two aspects of her narrative of the incident prior to trial. S. first told the police that Reed had "thrown" her into his car. Later she said Reed forced her into his car by threatening her with a knife. At trial she admitted that she went with Reed voluntarily. Montenegro testified that when she asked S. why she changed her story S. replied "she didn't change her story, that they, the [Los Angeles police], had changed her story." S. also changed

her statement about Reed's use of a condom. She told the nurse who examined her after the incident that Reed did not use a condom. At trial she testified that he did use one.

No countervailing considerations support the trial court's exclusion of mother's testimony. We disagree with the People's contention that allowing Reed to put S.'s mother on the stand in order to "conduct a fishing expedition" would have consumed an undue amount of time on a collateral matter. As we have earlier explained, the circumstances do not warrant a conclusion that Reed was engaged in an impermissible "fishing expedition" or that the subject was collateral to the issues in the case. Nor is there any reason to conclude that allowing the mother to testify would have consumed an unjustifiable amount of time. To the extent that inconvenience of a witness or delay in obtaining her presence could be considered, neither consideration weighed against her testifying. The prosecutor had previously represented to the court that the mother "will be here and available to testify."

C. Prejudice And Remedy

Reed contends that the court's refusal to allow him to call mother as a witness requires reversal of the judgment whether the error is evaluated under the *Chapman* reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18) or the *Watson* reasonable probability standard (*People v. Watson, supra,* 46 Cal.2d 818). We cannot evaluate the error under *either* standard, however, because we are in the same position that Reed occupied in the trial court; we do not know, and have no way of determining from the record, what S.'s mother would have testified to had she been called as a witness. A remedy exists, nonetheless.

Rather than choose between an affirmance of the judgment and an unconditional reversal, we will exercise our power under Penal Code section 1260 to "remand the cause to the trial court for such further proceedings as may be just under the circumstances." When the appellant prevails on a challenge which establishes only the existence of an unresolved evidentiary question, which may or may not vitiate the judgment, e.g. does S.'s mother have material testimony to offer, appellate courts have held the appropriate

disposition is to remand the cause to the trial court for resolution of the evidentiary question and, depending on that resolution, a reinstatement of the judgment or an order for a new trial. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 844-845; *People v. Minor* (1980) 104 Cal.App.3d 194, 199 (cited with approval in *People v. Moore* (2006) 39 Cal.4th 168, 176-177).)

We will order such a conditional reversal here.

V. FINES

A. Background

In the event the court reinstates the judgment of conviction, we address Reed's appeal concerning the penalties and fines imposed by the court.

The trial court imposed a $5,000 "state court construction" penalty and four "sex offender" fines totaling $1,800. With one exception, Reed challenges the court's authority to impose these fines and the amounts of the fines.[7]

A. State Court Construction Fine

The court imposed a penalty of $5,000 under Government Code section 70372, subdivision (a)(1) which requires the court to levy a penalty for state court construction in the amount of $5 for every $10 "upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ." The statute further provides, however, that the "construction penalty does not apply to . . . any restitution fine." (*Id*. at subd. (a)(3)(A).)

We agree with the parties that the court erred in calculating the amount of the court construction penalty. Apparently the court arrived at the sum of $5,000 by using, as the basis for its calculation of penalty, the $10,000 victim restitution fine that it imposed. Government Code section 70372, however, excepts any restitution fine from the

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[7] Reed does not challenge the sex offender fine for the rape conviction.

calculation of the state court construction penalty. We will direct the court to strike this penalty.

B. Sex Offender Fines

At the time Reed committed the sex offenses against S., Penal Code section 290.3, subdivision (a)[8] provided that every person convicted of an offense that requires registration as a sex offender under section 290, subdivision (c) shall, in addition to any other punishment, "be punished by a fine of two hundred dollars ($200) upon the first conviction or a fine of three hundred dollars ($300) upon the second and each subsequent conviction . . . ." At the time Reed was convicted of the sex offenses, the fines had increased to $300 and $500 respectively. (Stats. 2006, ch. 337, § 18.)

Finding that each of the convictions for rape (§ 261, subd. (a)(2)), oral copulation (§ 288a, subd. (b)(2)), and lewd conduct (§ 288, subd. (c)(1)) required Reed to register as a sex offender under section 290, subdivision (c), the court imposed a fine of $300 for the rape conviction and $500 for each of the three remaining convictions for a total of $1,800.00.

1. Multiple fines for multiple convictions in the same proceeding

In calculating the fines under section 290.3, subdivision (a) the trial court interpreted the progressive fines to apply to each "count" for which Reed was convicted. Reed maintains, however, that the Legislature intended the increase in the amount of the fine for the "second and each subsequent conviction" as a heightened punishment for recidivism and, therefore, the term "subsequent conviction" refers to the conviction for an offense committed and tried *subsequent* to the first sex offense conviction. He offers no support for his view of legislative intent and his construction of the statute was rejected in *People v. O'Neal* (2004) 122 Cal.App.4th 817, 822 (followed in *People v. Walz* (2008) 160 Cal.App.4th 1364, 1370, 1371.) In *O'Neal* the court explained that the defendant

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8 All further statutory references are to the Penal Code, unless otherwise indicated.

pleaded guilty to two counts of committing a lewd act upon a child. Each count resulted in a separate conviction. Therefore, "O'Neal had a second or subsequent conviction under section 290.3" (*People v. O'Neal*, *supra*, 122 Cal.App.4th at p. 822.) We agree with the reasoning in *O'Neal*.

2. Imposition of fines for oral copulation and lewd conduct

Reed contends that his oral copulation conviction under section 288a, subdivision (b)(2) cannot be the basis for a fine under section 290.3. He reasons that because the duty to register as a sex offender is a prerequisite to the imposition of the fine and because we held in *People v. Garcia* (2008) 161 Cal.App.4th 475 that the registration requirement for violation of section 288a, subdivision (b)(2) is unconstitutional[9] it necessarily follows that no fine can be imposed on a defendant convicted of violating section 288a, subdivision (b)(2) because the requisite registration requirement no longer exists. We agree with Reed's reasoning.

This same reasoning, however, does not apply to the fine for violating section 288, subdivision (c)(1), lewd conduct with a person aged 14 or 15, of which Reed was also convicted. The registration requirement for violation of section 288, subdivision (c)(1) has not been held unconstitutional. To the contrary, the court in *People v. Anderson* (2008) 168 Cal.App.4th 135 rejected an equal protection challenge to the registration requirement on the grounds section 288, subdivision (c)(1) protects children younger than the group protected under section 288a, subdivision (b)(2) and, unlike the oral copulation statute, the lewd conduct statute contains a specific intent requirement. For these reasons, the court concluded, the equal protection challenge fails because there is no similarly situated group for which registration is not required. (*Id*. at pp. 142-143.)

We will direct the court on remand to strike the fine imposed under section 288a, subdivision (b)(2).

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9 But see *People v. Manchel* (2008) 163 Cal.App.4th 1108 [distinguishing *Garcia*].)

3. Amount of the sex offender fines

The court imposed sex offender fines in the amounts contained in section 290.3, subdivision (a) as of the date of Reed's convictions ($300 for the first conviction, $500 for each subsequent conviction.) At the time Reed *committed* the offenses, however, the amounts were $200 for the first conviction and $300 for each subsequent conviction. Reed argues the court should have imposed the fines in the amounts that were in effect when he committed the crimes, not when he was convicted. The People concur, and we agree. We will direct the court to reduce the sex offender fines under section 290.3 to $200 and $300 respectively, $200 for the first offense and $300 for the other two offenses subject to the fine.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to give Reed an opportunity to subpoena S.'s mother and present her testimony. The court shall not limit mother's testimony to the "manipulation" issue but shall hear all relevant testimony mother has to offer. After hearing her testimony, the court shall evaluate the materiality of this new evidence in light of the whole record and determine whether to grant Reed a new trial. If the court determines not to order a new trial then the court shall reinstate the judgment. The defendant is entitled to be present at this hearing.

Should the court reinstate the judgment of conviction, it shall modify the sentence by striking the court construction penalty and the sex offender fine under section 290.3, subdivision (a), for violation of section 288a, subdivision (b)(2) (oral copulation with a minor) and impose fines on the remaining sex offense convictions in the sum of $200 for the rape conviction and $300 each for the two lewd conduct convictions for a total of $800.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

BAUER, J.*

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.